STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALLEN LEHMAN,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 196560
Ingham Circuit Court
LC No. 95-069709-FH

Before: Griffin, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), and sentenced to concurrent terms of ten to fifteen years' imprisonment. He appeals as of right. We reverse and remand for a new trial.

I

Defendant first contends that he was deprived of a fair trial as a result of questions posed by the prosecutor in three instances. We disagree.

The question posed to the victim's mother on whether she believed defendant did not seek an improper comment on witness credibility. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The prosecutor was exploring the mother's state of mind when she confronted defendant in her home with the victim's accusation, determined that defendant should leave, and contacted the police. In any event, the trial court sustained the objection to the question and answer, and our review of the record reveals no prejudice. Hence, reversal is not required on this ground. *People v Badour*, 167 Mich App 186, 197; 421 NW2d 624 (1988), rev'd on other grounds 434 Mich 691 (1990).

The question posed by the prosecutor to defendant on whether he had any idea why the victim would say the things that she said about him also fails to establish a basis for reversal. The question, regarding any possible motive for the victim to fabricate, did not shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 116 n 25; 538 NW2d 356 (1995).

Finally, defense counsel's failure to object to the question posed by the prosecutor to defendant on his relationship with the victim's half-sister precludes appellate review. Giving due regard to the fact that defense counsel, and not the prosecutor, used defendant's answer that he had a baby with the victim's half-sister to his tactical advantage during closing arguments, we are not persuaded that a miscarriage of justice will result if we do not review this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Whether defendant's claims are viewed cumulatively or singularly, we conclude that defendant has failed to establish that he was deprived of a fair trial. *People v Messenger*, 221 Mich App 171, 182; 561 NW2d 463 (1997).

II

Defendant next contends that the trial court committed evidentiary error by allowing the prosecutor to introduce evidence of his conviction and related underlying facts for fourth-degree criminal sexual conduct involving his own half-sister. The trial court's decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

A

We agree with defendant's contention that the trial court applied an incorrect test in determining if the evidence was admissible under MRE 404(b) because the record reveals that the trial court used the four-part test from *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), as applied in *People v Terry Miller (On Remand)*, 186 Mich App 660; 465 NW2d 47 (1991). The *Golochowicz* test was discarded in *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). To be admissible under *VanderVliet*, other acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose rather than to prove defendant's character or propensity to commit the crime; (2) the evidence must be relevant to an issue of fact of consequence at the trial; and (3) the evidence must be sufficiently probative to prevail under the balancing test of MRE 403. *Id.*; *People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997), lv pending. Further, upon request, a trial court may provide a limiting instruction under MRE 105. *VanderVliet, supra* at 75.

B

In the present case, the three counts of second-degree criminal sexual conduct required that the prosecutor prove beyond a reasonable doubt that sexual contact occurred and that the victim was under the age of thirteen years old. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Sexual contact is defined in MCL 750.520a(k); MSA 28.788(1)(k) as including

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

The three charged acts were the touching of the breasts (Count I), the licking of a nipple of a breast (Count II), and the touching of clothing covering the crotch area (Count III), although the jury ultimately convicted defendant of only the first two counts. The other acts evidence introduced by the prosecutor consisted of (1) the testimony of defendant's half-sister on the fact that defendant touched her breast and (2) a portion of defendant's plea to fourth-degree criminal sexual conduct stemming from this conduct. The trial court gave somewhat inconsistent and confusing instructions to the jury on the permitted use of this evidence by instructing the jury at the time of the half-sister's testimony that the testimony could only be used on the issue of whether the complained-of acts underlying the current charge were "not a mistake," but subsequently instructing the jury before deliberations that evidence of the "crime" for which defendant was not on trial could only be used in determining if it tended to show that defendant "used a plan, system, or scheme that he has used before this incident."

1

On appeal, the prosecution asserts that the trial court's first limiting instruction was a harmless misstatement because defendant never made a claim that would make lack of mistake applicable, but at the same time contends that the proffered evidence was arguably probative of defendant's intent because defendant's general denial of guilt put all elements of the offense at issue. We find that the prosecution's argument gives undue weight to defendant's general denial of guilt.

A general denial of guilt presumptively puts all elements of an offense at issue, but does not automatically entitle the prosecution to a pretrial ruling that the proffered evidence is admissible. *VanderVliet, supra* at 78-79. Indeed, only relevant evidence is admissible. MRE 402. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Two separate questions must be answered to determine relevancy under this definition, namely, its materiality (*i.e.*, was it of consequence to the determination of the action) and its probative force (*i.e.*, whether it makes a fact of consequence to the action more or less probable than without the evidence). *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996). The relationship of the elements of the charge, the theories of admissibility, and the defenses govern what is relevant and material. *VanderVliet, supra* at 75.

In the present case, the trial court's initial rationale in admitting the evidence, that the touching was "not a mistake," was erroneous. Although other acts evidence may be relevant to negate a claim of innocent intent, here, as the prosecution concedes, defendant never advanced a claim of mistake. Rather, the defense was that defendant did not touch the victim. Further, we note that neither the pretrial offer of proof made by the prosecutor on the admissibility of the evidence nor the trial testimony established any question of innocent intent. Under these circumstances, the other acts evidence should not have been allowed for this proffered purpose because, while the other acts evidence had logical relevancy, it lacks probative value relative to the consequential fact of defendant's intent.

2

Turning to the "plan, scheme, or system" purpose permitted by the trial court's other jury instruction, we note that this type of evidence is typically admissible only when the defendant commits a series of crimes in a unique, regular, or regimented manner. *Sabin, supra* at 535. In the present case, the similarities between the other act and the current charges were that defendant was alone with each victim, that one of defendant's acts was to touch the victim's breast, that each victim was a minor, and that the offense occurred in a bedroom. There is, however, no uniqueness about a defendant being alone with a minor when an alleged act of sexual contact occurs. Further, the fact that a touching occurred in a bedroom does not make it unique, demonstrate a regular or regimented conduct, or establish a plan on the part of the defendant. There is only evidence of a single episode involving defendant's half-sister in her home under circumstances that differ from the alleged touching that occurred while defendant was a guest in the victim's home.

Other acts evidence must move through a permissible intermediate inference, such as a common plan or scheme, to be relevant to actus reus. *VanderVliet, supra* at 87. Absent the intermediate inference, the other acts evidence bears only on propensity and is inadmissible. *Id*. Giving due consideration to the consequential fact, namely, whether defendant touched the victim in the manner claimed by the victim, we hold that the mere fact that defendant touched his half-sister on her breast (with an admitted purpose of sexual gratification) while he was alone with her does not make it more probable than not that defendant touched the victim on her breast (and then licked her nipple and touched the crotch area over clothing for an inferential purpose of sexual gratification) while he was alone with her. Hence, the other acts evidence was not relevant. MRE 401. For this reason, we find it unnecessary to consider any arguments pertaining to the balancing test of MRE 403.

C

Finally, we note that the prosecution asserts on appeal that the evidence was arguably probative of defendant's motive, but has not explained the rationale for this assertion. Further, while motive was one of the purposes referred to by the trial court when ruling to admit the other acts evidence, neither of the trial court's instructions permitted the jury to consider the evidence for this purpose. In light of this record, we are not persuaded that the trial court's decision to allow the other acts evidence can be upheld on a ground that the evidence should have been allowed for a purpose not contained in either limiting jury instruction.

Moreover, although jurors are presumed to have followed a court's instructions until the contrary is clearly shown, *McAlister, supra* at 504, upon considering the content of the limiting jury instructions in light of the weight and strength of the properly admitted evidence and the fact that defendant's denial of the touching made credibility and character pivotal issues, we hold that the trial court's error in allowing the other acts evidence requires reversal because the error affected defendant's substantial rights and a miscarriage of justice has been shown. MRE 103(a), MCL 769.26; MSA 28.1096, *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The improper injection of evidence that defendant touched the breasts of another minor female attacked defendant's character, invited the jury to convict defendant based on his propensity to commit the crime, and bolstered the

credibility of the victim. *People v Ullah*, 216 Mich App 669, 675-676; 550 NW2d 568 (1996). As in *Sabin, supra*, defendant has demonstrated a reasonable probability that the erroneously admitted evidence affected the outcome of the trial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Janet T. Neff